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FILED

No. (1) 08-438 SEP 29 2008

In The OFFICE OF THE CLERK
Supreme Court of the United States

TROY ALLEN LINGLE,

Petitioner,

v.

DAVID MITCHELL,
Superintendent of Mountain View
Correctional Institution,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Charles R. Brewer
Attorney at Law
Post Office Box 8938
Asheville, North Carolina 28814
(828) 251-5002

Counsel of Record for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE STATE TRIAL COURT DENIED PETITIONER THE RIGHTS OF DUE PROCESS OF LAW SECURED BY THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

II. WHETHER THE STATE TRIAL COURT DENIED PETITIONER THE RIGHT TO CONFRONT HIS ACCUSERS SECURED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS APPLIED TO THE STATES BY THE FOURTEENTH AMENDMENT IN DEPRIVING HIM THE RIGHT TO CONFRONT AND CROSS EXAMINE A WITNESS AGAINST HIM AT HIS SENTENCING HEARING

PARTIES TO THE PROCEEDING

All parties to petitioners' Fourth Circuit proceedings appear in the caption of the case before this Court.

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IN THE

SUPREME COURT OF THE UNITED STATES

TROY ALLEN LINGLE,

PETITIONER,

V.

DAVID MITCHELL, SUPERINTENDENT OF MOUNTAIN CORRECTIONAL INSTITUTION,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered July 1, 2008, denying petitioner a certificate of appealability from the denial of his federal habeas corpus petition.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in petitioner's case which is unpublished is attached to this petition as Appendix A. The judgment of the district court for the Western District of North Carolina in regard to petitioner's case is attached hereto as Appendix B.

JURISDICTION

The unpublished opinion of the Court of Appeals denying petitioner's request for issuance of a certificate of appealability was entered July 1, 2008. This petition is being filed within 90 days following the decision of the Court of Appeals. This Court has jurisdiction under 28 U.S.C. §1254(1). The jurisdiction in the federal court of first instance was by virtue of 28 USC §2254.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the United States Constitution. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when an actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment VI of the United States Constitution. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV, Section 1 of the United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner was indicted in May 1989 for two counts of First Degree Kidnapping and seven counts of Second Degree Kidnapping. He entered pleas of guilty and was sentenced to twelve years incarceration for each of the two First Degree Kidnapping charges and nine years for each of the Second Degree Kidnapping charges with all such sentences running consecutively for a total sentence of 87 years. Thereafter, petitioner filed a motion for appropriate relief based, *inter alia,* on ineffective assistance of counsel. The Honorable Beverly Beal, Senior Resident Superior Court Judge, ruled that the Office of the District Attorney had a conflict of interest and appointed the North Carolina Attorney General's Office to represent the State of North Carolina in connection with the motion for appropriate relief. Subsequently, he recused himself from hearing the motion for appropriate relief. (He, however, ultimately decided the motion for appropriate relief which forms the basis for this petition.) On October 8,2003, that motion for appropriate relief came on for consideration before the Honorable Richard Doughton, who entered an order granting the motion for appropriate relief and striking petitioner's pleas of guilty, thereby vacating the judgments entered based on such pleas. On October 8, 2003, petitioner again entered guilty pleas to the same offenses (as to the First Degree Kidnapping counts, the pleas were under

Alford); and a sentencing hearing was held before the Honorable Richard Doughton who imposed the same sentences despite hearing substantial evidence of petitioner's rehabilitation. At the sentencing hearing, the trial court admitted over objection a highly prejudicial document (quoted verbatim hereinafter) which form the basis of the petition for writ of habeas corpus. On October 20, 2003, petitioner filed a motion for appropriate relief in connection with the sentencing hearing. On November 18, 2003, petitioner filed a supplement to his motion for appropriate relief. The motion was grounded, in part, on the contention that the trial court's ruling violated petitioner's rights secured by the Constitution of the United States. It was denied by the trial court, and the North Carolina Court of Appeals did not grant certiorari.

Thereafter, petitioner filed a petition for the issuance of a writ of habeas corpus pursuant to 28 U.S.C. §2254 in the Western District of North Carolina. The respondent was ordered to file a response. When the response was filed it included a summary judgment motion which was granted by the district court. Petitioner filed an informal brief with the Fourth Circuit Court of Appeals seeking a certificate of appealability on February 29, 2008. The Fourth Circuit denied petitioner's motion for certificate of appealability and dismissed the appeal without oral arguments in an unpublished per curiam decision.

B. Statement of the Facts

At the hearing which is the subject of the petition the State called a witness who testified she had been in contact with Anna Lingle who is petitioner's former wife. The witness testified Anna Lingle had faxed a letter to her. The State attempted to offer the alleged letter from Anna Lingle into evidence after showing the same to defense counsel in the courtroom for the first time immediately prior to offering it into evidence. Petitioner's counsel briefly reviewed the letter and objected strenuously to its admission asserting to the court that the letter was extremely prejudicial. The trial court sustained the objection to the letter, and it was not admitted into evidence. *See* Tr. pp. 42-45. Thereafter, the petitioner took the stand and testified under oath. On cross examination, counsel for the State asked the petitioner questions about some of the matters raised in the letter.

At the conclusion of the evidence, counsel for the State asked the trial court to revisit its ruling in connection with the letter. The State asked the court to allow the letter into evidence. Tr. p. 141. The court inquired of counsel for the petitioner as to whether petitioner objected to the request. Counsel for the petitioner renewed petitioner's objection to the letter, but nonetheless the court admitted the letter into evidence. Tr. p. 142. The letter in question is attached as Appendix C.

The letter, supposedly authored by petitioner's ex-wife, was admitted into evidence over objection. The

letter is not signed, its alleged author was not in court, and the contents of the letter are not under oath. There was no adequate explanation of the inability of the State to have Anna Lingle appear in court and be subject to cross examination. When this letter was initially submitted to petitioner's counsel with the witness on the stand, he objected to its admission.

Following the conclusion of the evidence by the State, petitioner's counsel began putting on testimony. The last testimony was that of petitioner himself. When the State's counsel undertook the cross examination of petitioner, she asked him some questions concerning some of the matters addressed in the letter in question. He answered her questions under oath. At the conclusion of his testimony State's counsel asked the trial court to revisit his ruling in connection with the letter and to admit the letter on the basis that it allegedly showed that petitioner had not testified truthfully in answering questions that she posed to him during cross examination; however, the letter also contains prejudicial materials which were not the subject of any questioning by counsel for the State. The trial court asked petitioner's counsel if he objected to the letter at that time, and petitioner's counsel renewed his objection to the letter. Nonetheless, the trial court allowed the letter into evidence for the purpose of impeaching what petitioner testified to on the stand. Tr. p. 142. The trial judge read the letter. This was the last evidence received. After considering arguments, Judge Doughton proceeded to enter sentences in these cases.

REASONS FOR GRANTING THE WRIT

I. THE STATE TRIAL COURT DENIED PETITIONER THE RIGHTS OF DUE PROCESS OF LAW SECURED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE FEDERAL DISTRICT COURT IN GRANTING SUMMARY JUDGMENT TO THE RESPONDENT FAILED TO ADDRESS THE PETITIONER'S DUE PROCESS ARGUMENTS WHICH FORM THE CORE OF THE HABEAS CORPUS PETITION.

It is recognized that to the extent that a habeas petitioner alleges a state sentencing law error his claim is not cognizable on habeas review. *See Estelle v. McGuire*, 502 U.S. 62 (1991). It is clear, however, that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. *Gardner v. Florida*, 430 U.S. 349 (1977). A defendant has a due process right not to be sentenced on the basis of materially incorrect evidence. *See United States v. Tucker*, 404 U.S. 443, 447 (1972); *United States v. Reid*, 911 F.2d 1456 (10th Cir. 1990), *cert. denied*, 498 U.S. 1097 (1991); *United States v. Curran*, 926 F.2d 59 (1st Cir. 1991). A sentence may violate due process if it is carelessly or deliberately pronounced on an extensive and materially false foundation which the defendant had no opportunity to correct. *Skrzycki v. Lafler*, 347 F. Supp. 2d 448 (E.D. Mich. 2004); *see Townsend v. Burke*, 334 U.S. 736 (1948).

Furthermore, while hearsay statements may be considered at sentencing, due process requires that such statements be corroborated by extrinsic evidence. *United States v. Ponce*, 51 F.3d 820 (9th Cir. 1995). Due process requires that some minimal indicia of reliability accompany a hearsay statement. *United States v. Petty*, 982 F.2d 1365 (9th Cir.), *amended on other grounds*, 992 F.2d 1015 (9th Cir. 1993), *cert. denied*, 510 U.S. 1040 (1994); *United States v. Reid* (hearsay statement cannot be used in sentencing absent some minimal indication of reliability other than mere allegation). Because the use of hearsay in sentencing raises due process concerns, the defendant must be given adequate notice of and an opportunity to rebut or explain information that is used against him. *United States v. Pelliere*, 57 F.3d 936 (10th Cir. 1995); *United States v. Sammons*, 918 F.2d 582, 603 (6th Cir. 1990) (defendant must have meaningful opportunity to rebut contested information at sentencing); *United States v. Robinson*, 898 F.2d 1111 (6th Cir. 1990). In this case, petitioner's due process rights were violated in that he was not provided with adequate notice of the letter so as to have a meaningful opportunity to refute it and because the letter was obviously unreliable hearsay—it was not signed or sworn to and contained outrageous unfounded, uncorroborated, untrue, and highly prejudicial allegations of unrelated criminal conduct and bad character; and the letter was used by the sentencing judge in sentencing the petitioner. Even if it was used only to impeach the petitioner's testimony, such use, given the content of the letter, was sufficient to deny due process. Petitioner was

made aware of the letter only at the sentencing hearing and had no meaningful opportunity to refute it except by his own testimony, and the letter was then used to impeach his testimony. This is the epitome of the denial of due process. *See, e.g., United States v. Morales*, 47 Fed. Appx. 497 (9th Cir. 2002) (unpublished) (sentencing court violated defendant's due process rights by considering at sentencing informant's uncorroborated statements that were not supported by the requisite minimal indicia of reliability); *United States v. Weston*, 448 F.2d 626, 633 (9th Cir. 1971) (where sentencing judge considered presentence investigation report asserting that defendant was involved in other criminal conduct and was large-scale heroin dealer but the factual basis for such allegation was "almost nil," the court of appeals remanded for resentencing), *cert. denied*, 404 U.S. 1061 (1972); *Brown v. Luebbers*, 371 F.3d 458 (8th Cir. 2004) (upholding exclusion of letter from evidence in sentencing hearing in state court on basis that it was not highly relevant to a critical issue and letter's reliability could not be assured because it was not submitted as a sworn affidavit), *cert. denied*, 125 S. Ct. 1397 (2005); *cf. United States v. Harris*, 38 F.3d 95, 98 (2d Cir. 1994) (where defendant received adequate notice of and opportunity to respond to letters from victims received by sentencing judge, defendant was not denied due process), *cert. denied*, 513 U.S. 1198 (1995). Based on the foregoing authority, the state court's decision upholding the admission of the letter into evidence was contrary to, or an unreasonable application of, clearly established federal law, as

required for the grant of habeas relief under 28 U.S.C. § 2254(d)(1). *See Jones v. Polk*, 401 F.3d 257 (4th Cir. 2005). Moreover, the error in considering the letter at sentencing cannot be considered harmless, even if only used to impeach petitioner's testimony. Given the content of the letter, there is grave doubt whether the error in admitting the letter into evidence had a substantial and injurious effect or influence in determining the sentence. *See Brecht v. Abrahamson*, 507 U.S. 619 (1993); *O'Neal v. McAninch*, 513 U.S. 432 (1995); *Jones v. Polk*. Therefore, habeas relief should be granted. (It is noted that it is not clear that the harmless error standard set forth in *Brecht* and *O'Neal* has survived the passage of the AEDPA. *See Anderson v. Cowan*, 227 F.3d 893, 898 n.3 (7th Cir. 2000).) The petitioner's counsel was not aware of the existence of such letter until the very moment it was offered into evidence. The petitioner was not afforded any opportunity to cross examine its alleged author. The typewritten letter is not signed. There is no contention that the letter was under oath. The alleged letter suggests that the petitioner hogtied and blew the brains out of his first wife and her companion. There was no evidence before the court that petitioner had ever been charged with such an offense, much less convicted of it. In fact the North Carolina Supreme Court affirmed the conviction of Roger Lee McQueen for the murder of defendant's first wife Linda Lingle. See *State v. McQueen*, 295 N.C. 96, 244 S.E.2d 414 (1978). *McQueen* sets forth a lengthy recital of the evidence concerning the murder of defendant's first wife, Linda. This evidence should remove any cloud

created by Anna Lingle's alleged letter suggesting petitioner killed Linda Lingle; however, since petitioner's counsel was unaware of the letter until it was presented at the hearing, the case was not cited to the trial court by petitioner. Fairness dictates that the State should, nonetheless, have done so. The position maintained by the State in regard to this resentencing hearing in light of the State's prosecution of Roger Lee McQueen is indefensible. Either the State believes that Roger Lee McQueen is innocent of the killing of Linda Lingle and has wrongfully incarcerated him for these many years thereby justifying its thinly disguised effort at this petitioner's sentencing hearing to suggest this petitioner is responsible for Linda Lingle's murder; or the State believes that Roger Lee McQueen is guilty of Linda Lingle's murder and therefore is improperly suggesting this petitioner is responsible for her death. The State should be required to choose which position it wants to maintain, and the position must be the same in both cases.

The North Carolina Supreme Court's decision in *McQueen* contains a discussion by Mr. Justice Lake concerning the cross examination of defendant McQueen by the prosecutor. Mr. McQueen testified in his own behalf, and on cross examination the prosecutor sought to inquire about McQueen's suspected involvement in another murder in Arkansas. The record reveals that the questions were asked in good faith in that a detainer for McQueen had been filed by the State of Arkansas for murder. McQueen was asked and answered 14 questions concerning the Arkansas murder case, culminating with the

questions, "Do you remember...shooting her in the head?" He answered, "No, sir." Justice Lake then noted that "(t)he State, being bound by the answer of the defendant, offered no evidence of such shooting." (Emphasis added) *McQueen* at p. 430. It is the respectful contention of petitioner herein that the State was likewise bound by the answers of this petitioner to the questions of issues raised in Anna Lingle's alleged letter. The effort by the Assistant Attorney General of North Carolina to have the trial court accept an unsigned, unsworn, and untrue document in evidence over objection of petitioner's counsel (following the trial court's earlier ruling of its inadmissibility and offer to continue the matter to bring Anna Lingle into court to testify under oath and be subject to cross examination) on the guise of impeachment led the trial court to violate petitioner's constitutional rights in admitting the document into evidence. In viewing the propriety of the actions of the North Carolina Attorney General's Office in connection with the offering of this document into evidence, the Court's attention is invited to the decision of the Fourth Circuit Court of Appeals in the case of *McQueen v. Garrison*, 814 F.2d 951 (4th Cir. 1987). *McQueen* is an appeal by the State of North Carolina from the judgment of the United States District Court for the Eastern District of North Carolina (CA 82-675-HC) granting a writ of habeas corpus to Roger Lee McQueen. The significance of this case (like the *McQueen* case from the North Carolina Supreme Court) resides in the facts recited therein showing that Roger Lee McQueen, not petitioner

herein, murdered Linda Lingle and in the participation of the North Carolina Attorney General's Office. Both the appeal by Roger Lee McQueen to the North Carolina Supreme Court and his habeas corpus petition before the United States District Court from the Eastern District of North Carolina and the appeal therefrom to the Fourth Circuit Court of Appeals were handled by the North Carolina Attorney General's Office. Therefore, the Assistant North Carolina Attorney General who represented the State in the proceeding which is the subject of this petition either knew or reasonably should have known that this petitioner did not murder Linda Lingle and the letter which she offered into evidence was not true. Yet, she failed to advise the trial court of this critical fact. Her failure to advise the trial court cannot be viewed as a harmless oversight. Had the Assistant North Carolina Attorney General provided petitioner's counsel with a copy of the document prior to the hearing, petitioner's counsel would have been able to have conducted an investigation. The Assistant North Carolina Attorney General was either grossly negligent in failing to investigate the allegations in the letter concerning the murder of Linda Lingle or knowing the falsity of the allegation acted improperly in offering the document and in failing to disclose to the trial court that petitioner did not murder Linda Lingle. In either case, petitioner suffered greatly as a result.

In a footnote in the case of *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993). *Brecht* was cited and relied upon in respondent's supporting brief. Footnote 9 reads as follows:

> Our holding does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict. Cf. *Greer v. Miller*, 483 U.S. 756, 769, 97 L. Ed. 2d 618, 107 F.Ct. 3102 (1987) (STEVENS, J., concurring in judgment).

As heretofore noted, it is not certain that the harmless error standard set forth in *Brecht* to be applied in habeas cases has survived the passage of AEDPA; however, even if it has the foregoing language from footnote 9 seems relevant and applicable. Likewise, the Court's attention is invited to the concurring opinion by Stevens, J., in *Brecht* at pp. 639-644. Justice Stevens concurs with the majority decision which adopted the *Kotteakos* standard for review of whether an error is harmless in habeas cases. He writes that because the *Kotteakos* "standard accords with the statutory rule for reviewing other trial errors that affect substantial rights; places the burden on prosecutors to explain why those errors were harmless; requires the habeas court to review the entire record *de novo* in determining whether the error influenced the jury's deliberation; and leaves considerable latitude for the exercise of judgment by federal courts, I am convinced that our answer is correct. I write

separately only to emphasize that the standard is appropriately demanding." *Brecht* at 640-641. Justice Stevens concurring opinion presents a well-reasoned analysis of the *Kotteakos* standard. He writes that "*Kotteakos* plainly stated that unless an error is merely 'technical,' the burden of sustaining a verdict by demonstrating that the error was harmless rests on the prosecution. A constitutional violation, of course, would never fall in the 'technical' category." *Brecht* at 641. See *Kotteakos v. United States*, 328 U.S. 750, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946). Moreover Justice Stevens said, "We would misread *Kotteakos* itself if we endorsed only a single-minded focus on how the error may (or may not) have affected the jury's verdict. The habeas court cannot ask only whether it thinks the petitioner would have been convicted if the constitutional error had not taken place." *Brecht* at 642. Likewise, in the case before this Court, it is not sufficient to merely conclude that petitioner would have received the same sentence with or without the admission of the document. The concurring opinion points out that "(t)he purpose of reviewing the entire record is, of course, to consider all the ways the error can infect the course of a trial." *Brecht* at 642. Justice Stevens quotes extensively from Justice Rutledge's opinion in *Kotteakos* including the quote that *Kotteakos* "requires a reviewing court to decide that 'the error did not influence the jury, ' 328 U.S. at 764, and that 'the judgment was not substantially swayed by the error, ' *id.*, at 765. "*Brecht* at 642. In what the undersigned considers to be the most meaningful line in the entire *Brecht* decision, Justice Stevens writes that "(i)n the

end, the way we phrase the governing standard is far less important than the quality of the judgment with which it is applied." *Brecht* at 643. While it is clear that the standard for review of harmlessness in habeas review is less stringent than the review for harmlessness in direct appeal review under *Chapman v. California*, 386 U.S. 18, the *Brecht* decision is far from being a fatal blow to this petition. Moreover, as discussed below, it is reasonable, in light of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004) that the error could be viewed as a structural defect in that it violates the Confrontation Clause of the Sixth Amendment to the United States Constitution. If so, this would defy analysis by harmless error standards. See *Arizona v. Fulminate* 499, U.S. 279, 309 (1991).

Spencer v. Murray, 5 F. 3d 758, 762 (4th Cir. 1993) quoted approvingly from *Grundler v. North Carolina*, 283 F.2d 798, 802 (4th Cir. 1960):

> Normally, the admissibility of evidence, the sufficiency of evidence, and instructions to the jury in state trials are matters of state law and procedure not involving federal constitutional issues. It is only in circumstances impugning fundamental fairness or infringing specific constitutional protections that a federal question is presented. The role of a federal habeas corpus petition is not to serve as an additional appeal. *Grundler v.*

North Carolina, 283 F. 2d 798, 802 (4th Cir. 1960).

Spencer makes it clear that "a claim about the admissibility of evidence under state law rarely is a claim upon which federal habeas relief can be granted." *Spencer* at 762. There is a difference between "rarely" and "never". It must be reviewed on a case by case basis to determine whether the evidentiary issue is a circumstance "impugning fundamental fairness". In *Spencer* the issue related to the admission of DNA evidence. The court reviewed the issue and concluded the "(t)he error Spencer argues might have occurred with his DNA test...are not even remotely suggested by the record in this case." *Spencer* at page 762. After reviewing the record the court concluded that not only was there no constitutional error under the Due Process Clause, "no error at all has come to our attention." *Spencer* at p. 763.

In *Estelle v. McGuire*, 502 U.S. 62, 75, 116 L. Ed. 2d 385, 401, 112 S. Ct. 475, __ (1991), cited in respondent's brief in the district court , this Court held that in that case "that neither the introduction of the challenged evidence, nor the jury instruction as to its use, 'so infused the trial with unfairness as to deny due process of law.' " [citations deleted]. *Estelle* arose from a California conviction of Second Degree Murder in the killing of the defendant's infant daughter. The issue related to the admission of evidence to prove "battered child syndrome". The Ninth Circuit had granted habeas relief ruling that the evidence admitted to establish the syndrome was erroneously admitted because no evidence connected the defendant with the

prior injuries to the victim and no claim was made at the trial that the victim died accidentally. Further, the Ninth Circuit concluded that the trial court's instruction in regard to evidence of prior acts permitted the jury to convict the defendant simply on the basis of evidence that he had committed prior bad acts. These errors, the Ninth Circuit reasons, rendered the trial "arbitrary and fundamentally unfair" in violation of due process. This Court reversed. Renquist, Chief Justice, penned the decision for the Court. The decision reviews the evidence at some length. The Ninth Circuit had based its decision, in part, on its conclusion that the evidence had been admitted in violation of California law. The court citing and quoting *Lewis v. Jeffers*, 497 U.S. 764, 780, 111 L. Ed. 2d 606, 110 S. Ct. 3092 (1990) emphasized that habeas relief does not lie for state law errors and habeas courts should not second guess state court determinations of state law. Federal habeas review is limited to determining whether the United States Constitution or its laws or treaties have been violated during state proceedings. This Court concluded that the prior injuries to the victim were relevant to the case and therefore the assumption by the Ninth Circuit that it is a violation of due process for irrelevant evidence to be admitted in a criminal trial did not need to be further addressed. Specifically, the Court held that admission of the evidence in that case did not violate the defendant's due process rights. To glean from such a ruling that no state evidentiary ruling can be violative of due process would be a misreading of *Estelle*. The issue in *Estelle* as in the case now before

this Court is whether the evidence infused the proceeding with unfairness to deny due process of law. In the matter now before this Court the whole proceeding which must be "infected" is the sentencing hearing itself.

The Fourth Circuit has ruled on the propriety of a federal district court judge's reliance on new information brought forth at sentencing in *United States v. Powell*, 487 F.2d 325 (4th Cir. 1973). The defendant there was sentenced to five years in the penitentiary—twice as long as his coconspirators who had been convicted on additional counts. *Id.* at 327. The judge presiding at the sentencing hearing based his decision on a speculative reference to the defendant as having been the "ringleader" of the criminal operation which had been the subject of the charge. This accusation was found, on review, to have no basis in the record and was not derived from testimony or evidence adduced at trial. The Fourth Circuit deemed it, as such, to be "misinformation" warranting that the sentence be vacated. "Misinformation or an unfounded assumption concerning facts of this importance is sufficient to render the sentencing procedure invalid." *Id.* at 328. The defendant in *Powell* was, furthermore, denied the opportunity to respond to the unfounded accusation brought forth at sentencing. The reliance on the misinformation coupled with the lack of opportunity for the defendant to refute the new allegation rendered that such proceeding was not conducted in accord with constitutionally requisite due process.

"While not every type of misinformation will justify relief, a sentence cannot stand if it is based on assumptions concerning the defendant's criminal record that are 'materially false,' *Townsend v. Burke*, 334 U.S. 736, 741, 92 L. Ed. 1690, 68 S. Ct. 1252 (1948), or if it is founded 'in part upon misinformation of constitutional magnitude.' *United States v. Tucker*, 404 U.S. 443, 447, 30 L. Ed. 2d 592, 92 S. Ct. 589 (1972)." *Id.* at 328. "...the primary difficulty in the government's position is factual. The government has been unable to point to any evidence in either the trial of Powell's mother and his brothers or in Powell's own trial establishing that he was the ringleader of the group or that he was responsible for getting his brothers in trouble." *Id.* at 329. "These two defects in the sentencing procedure -- failure of the record to support material factors on which the severity of the punishment rested, and Powell's lack of an opportunity to explain or refute the derogatory information on which the judge relied -- denied Powell due process of law. *Townsend v Burke*, 334 U.S. 736, 92 L. Ed. 1690, 68 S. Ct. 1252 (1948); *United States v. Malcolm*, 432 F.2d 809, 816 (2d Cir. 1970)." Id.

In *United States v. Remy*, 738 F.2d 1156 (11th Cir. 1984), it was noted that when a defendant claims due process violation, it must be shown that information was both materially unreliable and that the judge based sentence upon such misinformation. A defendant is not denied due process of law when a judge considers out-of-court information in determining sentence. *Williams v. New York*, 337 U.S. 241-246, 250-51, 69 S. Ct. 1079, 1084-1085, 93

L. Ed. 1337 (1949), so long as the defendant is afforded an opportunity to refute it, and it is reliable, *U.S. v. Ammirato*, 670 f. 2d 552, 557 (5th Cir. Unit B 1982). The hearsay evidence relied on at sentencing must bear minimal indicia of reliability if the defendant's right to due process is to be preserved. *U.S. v. Baylin*, 696 f.2d 1030, 1040 (3d Cir. 1982); *U.S. v. Weston*, 448 F.2d 626, 634 (9th Cir.), *cert. denied*, 404 U.S. 1061, 92 S. Ct. 748, 30 L. Ed. 2d 749 (1972).

Id. at 1167.

Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 2539, 65 L. Ed. 2d 597 (1980). Otherwise there must be a showing of "particularized guarantees of trustworthiness." *Id.* Where a declarant's statements were originally made in a situation that encompassed trial-type protections such as oath, defendant's opportunity to cross-examine, or the factfinder's chance to observe declarant's demeanor, evidence including such hearsay statements is more likely to be trustworthy and reliable. *See Id.* At 69-74, 100 S. Ct. At 2540-2543. Likewise, where the declarant's statements were spontaneous, or against his own penal interest, *Dutton v. Evans*, 400 U.S. 74, 89, 91 S. Ct. 210, 219, 27 L.Ed. 2d 213 (1970) (plurality opinion), they bear sufficient indicia of reliability to serve as a basis for sentencing. Whether the hearsay statement is corroborated or contradicted by other evidence in the

record is also relevant in determining reliability. *U.S. v. Penn.* 721 F.2d 762, &65 (11th Cir. 1983).

Appellate modification of a statutorily authorized sentence . . . . is an entirely different matter than the careful scrutiny of the *judicial process* by which the particular punishment was determined. Rather than an unjustified incursion into the province of the sentencing judge, this latter responsibility is, on the contrary, a necessary incident of what has always been appropriate appellate review of criminal cases." *United States v. Lemon*, 232 U.S. App. D.C. 396 (DC Cir. 1983). "...once the guilt of the accused has been properly established, the sentencing judge, in determining the kind and extent of punishment to be imposed, is not restricted to evidence derived from the examination and cross-examination of witnesses in open court but may, consistently with the Due Process Clause of the Fourteenth Amendment, consider *responsible* unsworn or 'out-of-court' information *relative to the circumstances of the crime* and to the convicted person's life and characteristics." (emphasis added). *Williams v. Oklahoma*, 358 US 576, 584 (1959).

Though due process does not require that information brought forth at sentencing be restricted to the same as that introduced at trial, a sentence cannot be predicated on false information. *United States v. Weston*, 448 F.2d 626, 630 (9th Cir. 1971). The court noted, "[i]n essence, then, what we have is a conviction at a trial providing all of the safeguards required by the Constitution, of an offense warranting, in the opinion of the trial judge, the minimum sentence of five years. This is followed by a determination,

based on unsworn evidence detailing otherwise unverified statements of a faceless informer that would not even support a search warrant or an arrest, and without any of the constitutional safeguards, that [the defendant] is probably guilty of additional and far more serious crimes, for which she is then given an additional sentence of fifteen years. *Specht v. Patterson*, 1967, 386 U.S. 605, 87 S. Ct. 1209, 18 L. Ed. 2d 326; *Kent v. United States*, 1966, 383 U.S. 541, 553-554, 86 S. Ct. 1045, 16 L. Ed. 2d 84. To us, there is something radically wrong with a system of justice that can produce such a result." *Id.*

In *United States v. Kole*, 164 F.3d 164 (3rd Cir. 1998). the court held that "[a] sentencing judge denies a defendant the due process of law when he or she specifically considers 'misinformation of a constitutional magnitude' in fashioning a sentence." *Id.* at 177 (quoting *United States v. Spiropoulos*, 976 F.2d 155, 163 (3rd Cir. 1992). In this case, the defendant's flight following police entry and testimony of police was sufficient corroboration to uphold sentencing procedure. "Factual matters considered as a basis for sentence must have some minimal indicia of reliability beyond mere allegation and must either alone or in the context of other available information, bear some rational relationship to the decision to impose a particular sentence." *United States v. Mathews*, 773 F.2d 48, 51 (3rd Cir. 1985). In *Blackmon v. Scott*, 22 F.3d 560 (5th Cir. 1994) the court found due process was violated when no meaningful time was given to rebut introduction of new evidence at sentencing.

In *United States v. Galloway*, the Court of Appeals for the Ninth Circuit addressed the issue of due process standards within the setting of a sentencing hearing where dubious information had been submitted before the district court. *United States v. Galloway*, 1996 U.S.App. LEXIS 10969, 6 (1996). The court determined that a defendant's due process rights were violated where the district court judge admitted unreliable hearsay evidence at the sentencing hearing resulting in an upward departure from the Sentencing Guidelines. *Id.* The disputed testimony in *Galloway* consisted of a police officer's recitation of accusatory statements taken from defendant's children and their mother and a probation officer's statements made solely on the basis of a medical report. *Id.* These statements were found not to exhibit the necessary "minimum indicia of reliability" as the children's account of the events in question was not consistent, the defendant "was having domestic trouble at the time of the alleged incidents, and [because] the medical examinations of the children were inconclusive. *Id.* at 5-6.

> [T]he hearsay statements admitted at the sentencing hearing and testified to by the police officer and probation officer were unreliable and were the basis for the 24-month sentence. Admission and consideration of these hearsay statements violated [defendant's] due process rights,

> rendering his sentence illegal. He must be resentenced.

Id.

United States v. Williams displayed similar facts to those drawn out here where the sentencing judge relied upon incriminating statements made by defendant's ex-wife set in a letter sent to the judge in an initial sentencing proceeding. *United States v. Williams*, 41 F.3d 496, 500 (9th Cir. 1994). Like this case, the author of that letter had not testified at trial such that these statements could not have been tested by any means of cross-examination. *Id.* The court emphasized the fact that no reason was given by the presiding judge as to why the ex-wife's statements were accepted—why they were deemed to be *reliable* over the protestations of the defendant. *Id.* at 501. As such, the judge's acceptance of these statements were tagged as "arbitrary" and inconsistent with the demands of due process. *Id.* "A sentencing judge may consider hearsay evidence without running afoul of the Confrontation Clause, but the evidence must be reliable. *United States v. Petty*, 982 F.2d 1365, 1369 (9th Cir.), *amended*, 992 F.2d 1015 (1992), *cert. denied*, 114 S. Ct. 683 (1994). '[A] defendant clearly has a due process right not to be sentenced on the basis of materially incorrect information. Due process requires that some minimal indicia of reliability accompany a hearsay statement.' *Id.* (citations omitted)." *Id.* at 500.

The Fourth Circuit has stated in *United States v. King* that within a sentencing hearing setting, "[a]ny information may be considered, so long as it has 'sufficient indicia of reliability to support its probable accuracy.'" *United States v. King*, 1992 U.S. App. LEXIS 7343, 10 (4th Cir. 1992). The decision in *King* quotes the Ninth Circuit in going on to say, "unreliable allegations shall not be considered." *United States v. Weston*, 448 F.2d 626 (9th Cir. 1971). No due process violation was found in *King* where the sentencing judge relied upon testimony elicited from a United States Customs agent at the pertinent hearing. The substance of such testimony was based, in part, on the agent's own fact-finding procedure. *Id.* Nevertheless, the agent was at the sentencing hearing at which time this testimony was given and was, as such, available for purposes of cross examination.

Due process is satisfied when hearsay is introduced at sentencing if the evidence has "'some minimal indicia of reliability beyond mere allegation.'" *United States v. Hicks*, 948 F.2d 877, 883 (4th Cir. 1991) (citations omitted). The hearsay evidence introduced at the sentencing hearing in *United States v. Orrelien* was determined to be reliable where the declarant's statements were consistent with information the DEA agent had already received from another source. *United States v. Orrelien*, 1999 U.S.App. LEXIS 18219, 5 (4th Cir. 1999).

In the order of the habeas court denying the petitioner habeas relief it is stated that "...Petitioner

seems to be arguing that his right to confront witnesses against him was violated by the introduction of the letter written by ex-wife." (Emphasis added). The order suggests that the petition never specifically asserted a constitutional violation to form the basis of the habeas petition. Further, the order implies that the habeas petition rested alone upon the contention that the introduction of the referenced letter amounted to a Sixth Amendment violation. While it is true that the petitioner made a Sixth Amendment violation part of the basis of his habeas petition, the primary focus of that petition was unequivocally that the admission of this letter constituted a due process violation offensive to the dictates of both the Fourteenth and Fifth Amendments. Indeed, this is the ground upon which petitioner commenced his habeas petition and was as well thoroughly defended in his final filing with the habeas court in defending such petition against summary judgment. Yet, the order fails to in any manner address the due process arguments contained both in the petition itself and in filings by petitioner in support of the petition.

The letter that constitutes the subject of this proceeding has come in the categorizations of the respondent and the resulting order of this Court to appear innocuous as "hearsay evidence" against which the safeguards afforded in trial proceedings shall not be emulated in proceedings for sentencing. However, if such an innocuous category of hearsay can exist in any just and fair judicial proceeding, the content of this particular letter, as is more

thoroughly described below, certainly takes it out of that class of evidence. As the petitioner emphasized in his Response to the Summary Judgment Motion, this Court has made clear that "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *Gardner v. Florida*, 430 U.S. 349 (1977). Furthermore, while hearsay statements may be considered at sentencing, due process requires that such statements be corroborated by extrinsic evidence. *United States v. Ponce*, 51 F.3d 820 (9th Cir. 1995). Due process requires that some minimum indicia of reliability accompany a hearsay statement. *United States v. Petty*, 982 F.2d 1365 (9th Cir.), *amended on other grounds*, 992 F.2d 1015 (9th Cir. 1993), *cert. denied*, 510 U.S. 1040 (1994); *United States v. Reid* (hearsay statement cannot be used in sentencing absent some minimal indication of reliability other than mere allegation).

Given the irrelevant and accusatory nature of the letter here discussed, its influence upon the sentencing hearing remains untold. The letter was originally sent in the form of a facsimile that was, as such, unsigned, the alleged author was not present in court, and the contents of the letter were not under oath. In it, detailed and bold accusations were made against the petitioner, inculpating him not passively but *keenly* for matters unrelated to the offense addressed at the sentencing hearing. The author of this letter—ostensibly, the petitioner's ex-wife— accused the petitioner flatly of, among other crimes, a double murder, graphically asserting that

the petitioner "hogtied and blew the brains out" of his former wife. "While not every type of misinformation will justify relief, a sentence cannot stand if it is based on assumptions concerning the defendant's criminal record that are 'materially false,' *Townsend v. Burke,* 334 U.S. 736, 741, 92 L. Ed. 1690, 68 S. Ct. 1252 (1948), or 'if it is founded 'in part upon misinformation of constitutional magnitude.' *United States v. Tucker,* 404 U.S. 443, 447, 30 L. Ed. 592, 92 S. Ct. 589 (1972)." *Id. at 328.*

The severity of the sentence imposed by Judge Doughton at the October 8, 2003 hearing, being effectively much more severe than the intended effect of the sentence imposed at the 1989 sentencing hearing, evidences the petitioner's contention that this letter distorted the final outcome of the proceeding. This is so for two very significant reasons and considerations. First, substantial evidence was submitted to Judge Doughton suggesting significant rehabilitation that was not available to the first sentencing judge. Secondly, and most importantly, the first sentencing judge imposed the sentence with the understanding and belief that the petitioner would be parole eligible. Judge Doughton imposed the sentence with the firm understanding that he would never become parole eligible. Therefore, the sentence imposed by Judge Doughton, in his mind's eye, was nearly four times more severe than the sentence imposed in the mind's eye of the original sentencing judge. It is likely that such a severe sentence resulted, at least in part, from the untrue accusations contained in the letter

in question. Judge Doughton could have and should have permitted some or all of the sentences to run concurrently rather than consecutively. The State of North Carolina is charged with actual knowledge of the falsity of the letter in light of the fact that the State had prosecuted the actual murderer as set out above. For the State under such circumstances to submit such a letter containing materially false material to the sentencing Court knowing of its falsity cannot possibly withstand any due process analysis.

The limits of Due Process protections can seem at times hazy as the concept itself is broad and enveloping, but it need not reach far to receive in its province an infraction such as the one petitioner has laid out.

II. THE STATE TRIAL COURT DENIED PETITIONER THE RIGHT TO CONFRONT HIS ACCUSERS SECURED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS APPLIED TO THE STATES BY THE FOURTEENTH AMENDMENT IN DEPRIVING HIM THE RIGHT TO CONFRONT AND CROSS EXAMINE A WITNESS AGAINST HIM AT HIS SENTENCING HEARING.

While the undersigned does not conclusively assert that the recent Supreme Court case of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d. 177 (2004) requires the granting of habeas relief, it is, at the very least, instructive as to how this Court now views the effect of the Confrontation Clause on the use of testimonial statements. Mr. Justice Scalia, writing for the Court, said, "We once again reject the view that the *Confrontation Clause* applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon 'the law of Evidence for the time being.' (Citation deleted) Leaving the regulation of out-of-court statements to the law of evidence would render the *Confrontation Clause* powerless to permit even the most flagrant inquisitorial practices." *Crawford* at 50-51. The Confrontation Clause applies to witnesses against the accused. Justice Scalia turns to the dictionary to define testimony as "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Crawford* at 51.

Notably, Justice Scalia said that, "(w)here testimonial statements are involved, we do not think the Framers meant to leave the *Sixth Amendment's* protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'"...To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined." *Crawford* at 61. He went on to observe that "(d)ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." *Crawford* at 62. Justice Scalia concluded by noting that in that case a witness's testimonial statement against the petitioner was admitted even though the petitioner had no opportunity to cross examine her. "That alone is sufficient to make out a violation of the *Sixth Amendment* ...Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Crawford* at 68-69. The reasoning of *Crawford* applies, with equal force, to the letter which was drafted for testimonial purposes and admitted against this petitioner over

the objection of his counsel in the sentencing hearing.

In *United States v Fatico*, 579 F2d 707 (2nd Cir. 1978), it was noted that although hearsay could be introduced at sentencing, it must not be opposed factually by the defendant, or must, alternatively, have a firm foundation in the record. For example, in *United States v. Napolitano*, 761 F.2d 135 (2nd Cir. 1985), the Second Circuit allowed hearsay evidence to be introduced at the defendant's sentencing hearing to show the magnitude of his involvement in a band of organized crime where such evidence was corroborated by the testimony of a number of informants whose statements were made against their own penal interest. The nature of these statements—that they were made against the declarants' penal interest—gave them the appearance of reliability. Though the introduction of hearsay evidence is not barred within a sentencing hearing setting, such evidence must exhibit some indicia of reliability.

This Court has declared that evidence considered on a hearsay basis does not warrant the same level of inquiry as that considered for purposes of a Sixth Amendment violation. "Although we have recognized that hearsay rules and the Confrontation Clause are generally designed to protect similar values, we have also been careful not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements. See *California v. Green*, 399 U.S. 149, 155-156, 26 L. Ed. 2d 489, 90 S. Ct. 1930 (1970);

Dutton v. Evans, 400 U.S. 74, 86, 27 L. Ed. 2d 213, 91 S. Ct. 210 (1970) (plurality opinion); *United States v. Inadi*, 475 U.S. 387, 393, n.5, 89 L. Ed. 2d 390, 106 S. Ct. 1121 (1986). The Confrontation Clause, in other words, bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule. See, e. g., *Green*, supra, 399 U.S. at 155-156; *Bruton v. United States*, 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (1968); *Barber v. Page*, 390 U.S. 719, 20 L. Ed. 2d 255, 88 S. Ct. 1318 (1968)." *Idaho v. Wright*, 497 U.S. 805, 814 (1990).

The Supreme Court of North Carolina undertook this analysis within the setting of a capital sentencing hearing, concluding that heightened procedure was necessary to avoid offending the dictates of the Sixth Amendment. "This Court has...recognized the constitutional 'preference for live testimony,' which is premised upon the fundamental 'importance of cross-examination, the greatest legal engine ever invented for the discovery of truth.'...(internal cites omitted)... 'While the Confrontation Clause and rules of hearsay may protect similar values, it would be an erroneous simplification to conclude that the Confrontation Clause is merely a codification of hearsay rules." *State v. Nobles*, 357 N.C. 433, 437 (2003). The Court goes on to say, "It is well settled in this jurisdiction that while the Rules of Evidence do not apply at sentencing, the right to confront witnesses does. *State v. Holmes*, 355 N.C. 719, 733, 565 S.E.2d 154, 165, *cert. denied*, 537 U.S. 1010, 154 L. Ed. 2d 412,

123 S. Ct. 478 (2002); *State v. McLaughlin*, 341 N.C. 426, 458, 462 S.E.2d 1, 18-19 (1995), *cert. denied*, 516 U.S. 1133, 133 L. Ed." *Id.*

"[T]he sentencing hearing must be fair and just, and the trial court must provide the defendant with full opportunity to controvert hearsay and other representations in aggravation of punishment." *State v. Locklear*, 34 N.C. App. 37, 39 (1977), *rev'd on other grounds*, 294 N.C. 210, 241 S.E.2d 65 (1978) .

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted this the 29th day of September, 2008.

S/Charles R. Brewer
Charles R. Brewer
Attorney for Petitioner
NC Bar No. 6051
Post Office Box 8938
Asheville, NC 28814
(828) 251-5002
crboffice@aol.com

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-6114

TROY ALLEN LINGLE,
Petitioner - Appellant,

v.

DAVID MITCHELL, Superintendent of Mountain View Correctional Institution,
Respondent - Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Statesville. Richard L. Voorhees, District Judge. (5:05-cv-00226-RLV)

Submitted: June 26, 2008 Decided: July 1, 2008

Before KING and DUNCAN, Circuit Judges, and WILKINS, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Charles Robinson Brewer, Asheville, North Carolina, for Appellant. Mary Carla Hollis, Assistant Attorney General, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Troy Allen Lingle seeks to appeal the district court's order denying relief on his 28 U.S.C. Section 2254 (2000) petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. Section 2253(c)(1) (2000). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. Section 2253 (c)(2) (2000). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that any assessment of the constitutional claims by the district court is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Rose v. Lee, 252 F. 3d 676, 683-84 (4th Cir. 2001). We have independently reviewed the record and conclude that Lingle has not made the requisite showing. Accordingly, we deny Lingle's motion for a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA STATESVILLE DIVISION
5:05CV226-3-V

TROY ALLEN LINGLE,	)	
	)	
Petitioner,	)	
	)	
V.	)	**ORDER**
	)	
DAVID MITCHELL, Supt.)	)	
	)	
Respondent.	)	
	)	

THIS MATTER is before the Court upon Petitioner Troy Allen Lingle's (hereinafter "Petitioner") Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 (Document No. 1.) Also before the Court is the State's Motion for Summary Judgment (Document No. 3), the Petitioner's Response to the State's Motion for Summary Judgment (Document No. 8); and the State's reply Brief (Document No. 9.) For the reasons stated herein, Petitioner's Petitioner for Writ of Habeas Corpus will be denied and dismissed.

I. Factual and Procedural Background

A review of the record reveals that on November 30, 1989 Petitioner pled guilty to two counts of first-degree kidnapping and seven counts of second-degree kidnapping and was sentenced to presumptive sentences totaling eighty-seven years. Petitioner

noticed an appeal to the North Carolina Court of Appeals, which was dismissed, and filed a petition for writ of certiorari with that court, which was denied.

On November 7, 2002, Petitioner, through counsel, filed his first motion for appropriate relief ("MAR"). Following a hearing on October 8, 2003, at which the State stipulated that Petitioner was entitled to relief based upon one of the claims in his MAR, Petitioner was granted a new trial. Petitioner entered an Alford[1] plea of guilty to two counts of first-degree kidnapping and pled guilty to seven counts of second-degree kidnapping pursuant to an agreement with the State. . Petitioner agreed to leave the disposition of his sentence to court's discretion. During Petitioner's sentencing hearing, the State attempted to introduce a letter written by Petitioner's ex-wife.[2] (Sentencing Transcript at 43.) Petitioner's counsel objected and the court sustained the objection. (Sentencing Transcript at 43-45.) After several character witnesses testified on his behalf, Petitioner testified and the State cross-examined him, without objection, about some matters referenced in his ex-wife's letter. (Sentencing Transcript at 125-141.) After Petitioner testified, the

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[1]North Carolina v. Alford, 400 U.S. 25 (1970) (concluding that "even if [defendant] is unwilling or unable to admit his participation in the acts constituting the crime" he can plead guilty).

[2]Petitioner's ex-wife was not present at Petitioner's sentencing hearing. Indeed, there was testimony that she was afraid to come to court and testify.

State again moved to introduce the letter, arguing that its content was contrary to Petitioner's testimony. (Sentencing Transcript at 141.) Over objection from Petitioner, the court noted that it would "look at [the letter] for the purpose of impeaching what [Petitioner] said on the stand," and read the letter. (Sentencing Transcript at 142.) The court sentenced Petitioner, without comment concerning the letter, to two active, presumptive terms of twelve years for the first-degree and seven active, presumptive terms of nine years for the second-degree kidnapping counts.[3] Petitioner's sentences were to run consecutively and totaled eighty-seven years. (Sentencing Transcript at 155-158.) Petitioner filed, but withdrew, an appeal to the North Carolina Court of Appeals.

On October 20, 2003, Petitioner, through counsel, filed a second MAR in superior court in which he alleged that the introduction of the letter, written by his ex-wife, to impeach his own testimony at his sentencing hearing violated his rights to due process and confrontation as guaranteed by the United States and North Carolina Constitutions. Petitioner's MAR was denied on January 26, 2005. On April 22, 2005

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[3]Although Petitioner avers in his memorandum attached to his Section 2254 petition that Judge Doughton read the letter and immediately sentenced petitioner, the Court has reviewed the entire Sentencing Transcript and notes that the transcript does not reflect this course of events. Instead, the transcript reflects that after Judge Doughton read the letter, he allowed counsel to make their arguments which consisted of several pages of text before he pronounced his sentence.

Petitioner filed a petition for writ of certiorari with the North Carolina Court of Appeals which was denied on May 10, 2005. Petitioner, through counsel, filed the instant petition on July 15, 2005 alleging that he "was denied his Constitutional rights by the admission of an unsigned, unsworn letter, over objection, containing highly prejudicial allegations against petitioner." (Petition at 6.)

II. Standard of Review

Generally speaking, the standard of review to be applied by the Court to habeas cases is "quite deferential to the rulings of the state court." Burch v. Corcoran, 273 F.3d 577, 583 (4th Cir. 2001). Indeed, as the Burch Court noted:

> [pursuant to the standards promulgated in 28 U.S.C. § 2254, a federal court may not grant a writ of habeas corpus with respect to a claim adjudicated on the merits in state court proceedings unless the state court's adjudication; (1) "resulted in a decision that was contrary to, or involved as unreasonable application of, clearly established Federal Laws, as determined by the Supreme Court of the United States" . . . ; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding . . . ."

Id. (Internal citations omitted).

The Supreme Court has explained that a state court adjudication is "contrary" to clearly established federal law, only if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] court has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 413 (2000), quoted in Burch. An unreasonable application is different from an incorrect application of federal law, the former being the requisite showing. Therefore, this Court may not issue the writ even if it concludes in its own independent review, that the relevant state court merely made an incorrect or erroneous application of the correct federal principles. Id.

Finally, the applicable standard of review is to be applied to "all claims 'adjudicated on the merits," that is, those claims substantively reviewed and finally determined as evidenced by the state court's issuance of a formal judgment or decree." Thomas v. Davis, 192 F.2d 445, 455 (4th Cir.1999).

III. Analysis

Petitioner claims that he was denied his Constitutional rights by the admission of a letter during his sentencing hearing written by his ex-wife. "State Court trial rulings regarding the admission and exclusion of evidence are cognizable in federal habeas corpus review only to the extent that they violate

specific constitutional provisions or are so egregious as to render the entire trial fundamentally unfair, thereby violating the Due Process Clause of the Fourteenth Amendment." Howard v. Moore, 131 F.3d 399, 415 n. 18 (4th Cir. 1997); see also Estelle v. McGuire, 502 U.S. 62, 72 (1991) ("The only question for us is 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'") (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)).

Here, although the State argues that Petitioner "fail[ed] to assert that any specific constitutional provision was violated by the admission of Mrs. Lingle's letter," (Brief in Support of Summary Judgment at7), Petitioner seems to be arguing that his right to confront witnesses against him was violated by the introduction of the letter written by his ex-wife. The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted by the witnesses against him." Crawford v. Washington, 541 U.S. 36, 42 (2004). However, the Supreme Court has not held that sentencing proceedings are "criminal prosecutions" for Sixth Amendment purposes. See United States v. Johnson, 935 F.2d 47, 50 (4th Cir. 1991). As such, there is no clearly established federal law that the Confrontation Clause applies in sentencing proceedings. See United States v. Roche, 415 F.3d 614, 618 (7th Cir. 2005) ("[W]itnesses providing information to the court after guilt is established are not accusers within the meaning of the confrontation clause."); United States v. Luciano, 414 F.3d 174, 179 (1st Cir. 2005) ("[T]here

is no Sixth Amendment Confrontation Clause right at sentencing."); United States v. Martinez, 413 F.3d 239, 243 (2d Cir. 2005) (reaffirming prior holdings that the constitutional right of confrontation does not bar the admission of hearsay testimony at sentencing proceedings); United States v. Higgs, 353 F.3d 281, 324 (4th Cir. 2003) ("It is far from clear that the Confrontation Clause applies to capital sentencing proceedings."); United States v. Silverman, 976 F.2d 1502, 1514 (6th Cir. 1992) (en banc) (discussing the "inapplicability of the Confrontation Clause to the sentencing procedure"). Consequently, there is no clearly established federal law that introduction of hearsay evidence at a sentencing hearing violates a defendant's rights under the Confrontation Clause.

Furthermore, the introduction of the letter written by Petitioner's ex-wife was not "so egregious as to render the entire [sentencing] fundamentally unfair. Howard v. Moore, 131 F.3d 399, 415 n. 18 (4th Cir. 1997). Judge Doughton expressly stated that he would "look at' the letter for impeachment purposes only. The letter was not admitted at trial for consideration by a jury, perhaps unskilled at distinguishing the admission of evidence as proof of guilt and the admission of evidence for the limited purposes of impeachment. Rather, it was admitted at sentencing for consideration by a judge, who, unlike a jury, is well versed in the proper scope of impeachment evidence, and who can distinguish competent evidence from incompetent evidence. Moreover, there is no indication that Judge Doughton discredited Petitioner's testimony based upon the letter, much less predicated

his sentence on its contents. The State did not reference the letter or Petitioner's credibility in its sentencing argument. In his remarks to Petitioner, Judge Doughton in no way indicated that Petitioner's sentence was based, in whole or in part, on anything in the letter. In fact, Judge Doughton never mentioned Petitioner's credibility, the letter, or Petitioner's ex-wife. Rather, Judge Doughton expressly stated that the sentence was imposed with due consideration given to the victims. (Sentencing Transcript at 155-158.) Judge Doughton sentenced Petitioner to the presumptive sentencing terms for the crimes to which he pled guilty, whereby Petitioner received the very same sentence imposed at his 1989 sentencing hearing at which his ex-wife's letter was not introduced.[4] Petitioner has not presented evidence establishing that the introduction at his sentencing hearing of a letter written by his ex-wife rendered his sentencing hearing fundamentally unfair,

Moreover, Petitioner raised this claim in his MAR. In adjudicating the merits of Petitioner's claim in his MAR, the MAR court denied relief based on the following conclusions:

2. Formal rules of evidence do not apply at a sentencing hearing. See N.C.G.S. 15A- 1334(b) and N.C.G.S. 8C, Rule 1101(b)(3)).

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[4]Petitioner was sentenced and resentenced under North Carolina's Fair Sentencing Act, now repealed. N.C.G.S. Sections 15A-1340.1 to 15A-1340.7 (repealed 1993).

3. Sworn testimony, which may include reliable hearsay, may be included in information used to determine a factual basis for entry of a plea of guilty. See N.C.G.S. 15A-1022(c)(4).

4. The evidence to which objection has made was properly received by the sentencing court for a limited purpose. Receipt of the evidence did not result in aggravation of the sentences.

5. Although formal rules of evidence did not apply, the sentencing hearing was fair and just, and the defendant was given the opportunity to contest all evidence presented to show aggravating factors and to present evidence of mitigating factors.

6. Defendant has failed to show prejudicial error amounting to a denial of some substantial right, abuse of discretion, procedural conduct prejudicial to defendant, or circumstances that manifest inherent unfairness and injustice, or conduct which offended a sense of fair play.

7. The Court concludes as law that Constitutional rights were not violated by the statutory provisions in 15A-1334(b), or the application of any rule of evidence, in consideration of the "Anna Lingle fax statement" by the sentencing judge. This determination is based on the manner in which the plea and sentencing hearing was conducted, and the careful consideration given by Judge Doughton to all

presentations on behalf of both the State and Defendant, and on the fact that no aggravation of any sentence imposed resulted from the hearing. The Defendant has had a full and fair consideration of the merits of the ground asserted.
(MAR Order, January 26, 2005.)

This decision of the MAR court is correct. It is not contrary to, nor does it involve an unreasonable application of clearly established federal law as determined by the United States Supreme Court, i.e Estelle. See Early v. Packer, 537 U.S. 3, 8 (2002) (providing that state court need not cite or even be aware of United States Supreme Court cases in order to obtain deferential standards of review). Nor is the decision based on an unreasonable determination of facts in light of the evidence presented in the state court proceedings. Therefore, Petitioner's claim that evidence was admitted at his sentencing hearing in violation of the Constitution is denied pursuant to the deferential standards of review contained in 28 U.S.C. § 2254(d) and (e). See Williams v. Taylor, 529 U.S. 362 8 (2000). There is no requirement that the state court specifically cite United States Supreme Court precedent in its order, so long as its ultimate adjudication is not contrary to, nor involves an unreasonable application of clearly established federal

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[5]Because there is no clearly established Supreme Court precedent that introduction of hearsay at sentencing violated the confrontation Clause, the State court MAR Order could not be contrary to Supreme Court precedent.

law. Thomas v. Taylor, 170 F.3d 466, 475 (4th Cir.)("[T]he phrase 'adjudication on the merits' in section 2254(d) excludes only claims that were not raised in state court, and not claims that were decided in state court, albeit in a summary fashion.", cert. denied, 119 S.Ct (1999). Petitioner's claim is without merit and is also denied pursuant to § 2254(d) and (e).

IV. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that Petitioner's Petition under 28U.S.C. § 2254 for a Writ of Habeas Corpus is Denied and Dismissed. The State's Motion for Summary Judgment (Document No. 3) is Granted.

SO ORDERED.

Signed: December 4, 2007

Richard L. Voorhees
United States District Judge

APPENDIX C

Letter admitted in evidence

I am the reason Troy Lingle went into the Shelter Home as Iwas married to him at that time. Once he found out where Iwas, he would sit outside and watch the shelter. He would shine flashlights in my window at night. The police told us there was nothing we could do. There was no stalking law at that time. Icould never get any help from them. Once when Iwent to apply for a protection order, an officer actually asked me "Just what are you doing that makes that boy so mad?" Maybe if someone had listened to me, this would not have happened. Everyone thought he was such an upstanding citizen and a "good old boy". Ifeel that before you even consider reducing the Sentence for Troy Allen Lingle, you should know the type of person he really is. Neither his Prison record nor his "ministry" friends can begin to shine light on the real man (I use the term loosely) he is. Ido know the real person he is and that is why Iam writing to you. Years of suffering from the effects of his evil ways prevent me from being there in person. I cannot tell you the lengths Ihad to go through to escape him-he even made me go to work with him because he knew as soon as he turned his back i would run again. Only the time he has spent in prison has allowed me some freedom. Iknow what he is capable of. He told me how he had watched his mother murder a man when he was 4 years old from the back set of a car. He said that he could not "beat the demons", that they had been with him since. he told me how he had gotten tired of being a husband and father when he was

married to his first wife, Linda Hooper. He said they had given their son up to Human Services, and he sent Linda home on a bus. Later he changed his mind, but Human Services would not let him have his son back. He then went looking for Linda. He could not find her. He finally found out where she was staying. He said that he and his cousin went there. He said they climbed either a wall or a fence, went into the house and waited for her. When she and another woman came in, he said they "hog-tied them", and "blew their brains out". He said his cousin's wife was their alibi. I have since found out that these murders did in fact take place, and that Roger McQueen is serving a life sentence for it. No one will ever convince me that it was not Troy Lingle who did it. He told me in such detail. he used to take me to her grave to scare me During a road rage incident in I988, he stabbed Clarence Calloway, and his brother Gary later shot Clarence in self defense because Troy was not man enough to admit he had stabbed him. I know what happened because I was there. He brought his knife back to the truck and told me to "clean it off', then we went to the Rocky Road where he buried it. Once, he arranged a robbery with his brother and Anthony Howell. He told DA Brown about it and made arrangements to have himself and me arrested along with Gary and Anthony during the robbery and we would be lot go, and he would get a reward from Crimestoppers. He decided to give the police the slip just to prove he could, went with Gary, Anthony and myself and buried the UZI. He took them home, went and met

with DA Brown, took him to where the UZI was, and turned it in. He then went back to Anthony Howell's house, accused him of stealing and selling the UZI, and beat him up. Later Troy Lingle got a check from Crimestoppers. He is the type of person that would do drugs with someone and then turn them in for the money. The man is a menace to society. He never went anywhere without a rifle. He owed many people painting that he collected on with the excuse of needing supplies, but never did the work. He abused his second wife for I5 years. held her and their children at gunpoint on at least one occasion. he spray painted the inside of their old house orange, and shot out the garage windows when he found out she had moved without telling him. Although they were divorced and he was living with me, he felt he had every right to know her every move. He abused me both physically and emotionally for more than a year. No matter what I did, I could not escape. He would report my car stolen, tell the police that I had gone to the pawn shop and taken all of his gold necklaces, anything he could do to get help finding me. Once when he found me, he wrecked the car on purpose in Hickory. He said, "If I can't have you, no one can" as we went over the embankment. It still amazes me that we walked away from it. The day after we were married he held a.38 to my head and kept clicking it and laughing. He had read poetry I had written over the years and was convinced I was sleeping with every man in the State. As if! could have time. I couldn't even take a long time in the bathroom without him coming in to see if I had

jumped out the window. I know that I would not be alive today had he not gone to prison. He went into that Shelter home to find out if I would come home, and if not, was going to kill me and supposedly himself. These women were there to escape men just like him. Imagine what that did to their quality of life. Any reduction to his sentence will be a reduction to my quality of life and that of a lot of others. He thinks that it is our fault that he is in prison, not his. I am sure that this time has not changed him, and never will. The only time he will change is when he is dead and turned to dust. 87 years is not enough. Please do not give him any less.

Hopefully,
Anna